Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
FIBER TECHNOLOGIES NETWORKS, INC.	)	DA03-376
	)	WC Docket No. 03-37
Petition for Preemption Pursuant to Section 253 Of the Communications Act of Discriminatory Ordinance, Fees and Right-of-Way Practices of the Borough of Blawnox, Pennsylvania	)	

REPLY COMMENTS OF NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND THE PENNSYLVANIA LEAGUE OF CITIES AND MUNICIPALITIES

Submitted by:

Kenneth S. Fellman, Esq.
Kissinger & Fellman, P.C.
Ptarmigan Place, Suite 900
3773 Cherry Creek N. Drive
Denver, Colorado 80209
Phone: 303-320-6100
Facsimile: 303-320-6613
kfellman@kandf.com

Attorneys for National Association of Telecommunications Officers and Advisors (NATOA), National League of Cities (NLC) United States Conference of Mayors (USCM), National Association of Counties (NACo) and the International Municipal Lawyers Association (IMLA)

Adrian E. Herbst, Esq.
The Baller Herbst Law Group, P.C.
953E Grain Exchange Building
400 South Fourth Street
Minneapolis, Minnesota 55415
Phone: 612-339-2026
Facsimile: 612-339-4789
aherbst@baller.com

Attorneys for the Pennsylvania League of Cities and Municipalities

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SUMMARY

At the outset, it should not be lost on the Commission that among all the filed comments in this proceeding, only the Local Governments recognized and referenced the Commission's suggested guidelines.[1] The filed comments have not included evidence to meet the burden of proof required by Commission precedent.[2] Neither Fiber Tech in its Petition, nor any of the industry commenters supporting preemption, recognized even the existence of the Commission guidelines, let alone produced credible and probative evidence as those guidelines suggest is required.

Most of the arguments made by the industry commenters fall into one of three categories. First, they assume or suggest that the allegations of Fiber Tech's Petition support a violation of §253(a). Second, they argue that the ordinance is not competitively neutral and non-discriminatory because it applies to CLECs and not ILECs. Third, they claim that the per linear foot fees imposed by the ordinance are neither management of the rights of way, nor fair and reasonable compensation. None of these arguments is compelling, and the evidence presented to the Commission in these comments does not support preemption.

Moreover, some of the comments urge the Commission to expand this proceeding into one of a general rulemaking regarding rights and obligations under §253. Such an action would be a violation of the Administrative Procedures Act. In addition, various industry commenters based their arguments on allegedly unreasonable or illegal conditions imposed by other local

[1] Suggested Guidelines for Petitions for Ruling Under §253 of the Communications Act, FCC 98-295, released Nov. 17, 1998; 13 FCC Rcd. at 22971-72.

[2] SECOND REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, IN THE MATTER OF IMPLEMENTATION OF THE SUBSCRIBER CARRIER SELECTION, CC Docket No. 94-129, FCC 98-334, POLICIES AND RULES CONCERNING UNAUTHORIZED CHANGES OF CONSUMERS LONG DISTANCE CARRIERS, Released: December 23, 1998, fn. 289, citing Motion for Declaratory Ruling Concerning Preemption of Alaska Call Routing and Interexchange Certification Regulations as Applied to Cellular Carriers, Memorandum Opinion and Order, 12 FCC Rcd 13987, 13,991 (1997). Cf. California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934, 12 FCC Rcd 14191 (1997) (Commission denied petition for preemption under section 253 because petitioner failed to present sufficient record demonstrating barrier to entry); TCI Cablevision of

governments that were either unnamed, or that were named, but were not notified that they had been cited in this proceeding. Allegations of improper actions of local governments that are not specifically named and notified, so as to be given an opportunity to respond in this proceeding, should be disregarded.

These Reply Comments further support the positions asserted in the Local Governments' Initial Comments. We respectfully request that the Commission either dismiss for lack of jurisdiction, defer action on the petition and refer the matter to Pennsylvania courts, or deny the petition due to insufficient evidence. At a minimum, the Commission must not use this proceeding as a means to adopt *de facto* rules on the meaning of fair and reasonable compensation.

Oakland County, Inc., 9 Comm. Reg. (P&F) 730 (1997) (petitioner seeking preemption under section 253 bears burden of proof to demonstrate that it is entitled to such relief).

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The National Association of Telecommunications Officers and Advisors ("NATOA"), National League of Cities ("NLC"), United States Conference of Mayors ("USCM"), the National Association of Counties ("NACo"), International Municipal Lawyers Associations ("IMLA"), and the Pennsylvania League of Cities and Municipalities ("PLCM") (collectively referred to as "the Local Governments") respectfully submit these reply comments in opposition to the Petition for Preemption pursuant to §253, filed by Fiber Technologies Networks, L.L.C. ("Fiber Tech") against the Borough of Blawnox, Pennsylvania ("Blawnox" or "the Borough").

I. THE INDUSTRY COMMENTERS GENERALLY FAIL TO ADDRESS THE JURISDICTION ISSUE.

As stated in the Local Governments' Initial Comments, the Commission does not have jurisdiction under §253(d) to address the preemption of rights of way regulations or the compensation for the private use of public rights of way by telecommunications companies. Except for Time Warner Telecom ("TWT"), the industry commenters did not address the issue of jurisdiction, or the legislative history supporting the Local Governments' position. That

legislative history will not be repeated in these Reply Comments, except as it relates to TWT's comments.

TWT correctly states that the Commission has never addressed the jurisdiction issue under §253(c).[3] It suggests that Senator Feinstein's explanation indicating that the Commission would have no jurisdiction should be disregarded.[4] The weakness in this argument is that Senator Feinstein's remarks were not simply stray comments, and they were indeed supported by the statutory language.

In the Senate debate on S652, Senators Feinstein and Kempthorne offered a floor amendment to strike subsection (d) in its entirety, which would have eliminated FCC jurisdiction over *any* barrier to entry disputes. That amendment failed by a vote of 44-56 on June 14, 1995. The Senate subsequently adopted, by voice vote, a substitute amendment supported by Senators Feinstein and Kempthorne, and offered by Senator Gorton. The amendment as adopted read as follows:

> (d) if, after notice and an opportunity for public comment, the Commission determines that a state or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

The purpose of the Gorton amendment was to preclude Commission jurisdiction over disputes involving local government authority over rights of way management and compensation, while preserving Commission jurisdiction over telecommunications business regulation by state or local regulations. Senator Gorton's explanation of this language as cited in our Initial Comments, clearly indicates that rights of way management and compensation issues fall outside

[3] TWT Comments, p. 18.

[4] *Id* at p. 23, n.23, citing *Allen v. Attorney General of Maine*, 80 F.3d 569 (1st Cir. 1996; *Pappas v. Buck Consultants*, 923 F.2d 531 (7th Cir. 1991)) [Holding that stray comments should not be attributed to the full body if not supported by statutory language or Committee reports.]

of the Commission's jurisdiction.[5] The examination of the process in which the initial language of the statute was amended, the descriptions of multiple Senators regarding the meaning of that language, the plain language of §253(d) which excludes any reference to Commission jurisdiction for subsection (c) disputes, together with 47 U.S.C. §601(c)(1) which states there is to be no implied preemption of any state or local authority, indicates that Senator Feinstein's explanation cannot be considered "stray comments." The legislative history is clear, and the Commission has no jurisdiction to address §253(c) disputes.

II. THERE IS NO PROOF OF A SECTION 253(a) VIOLATION.

Without citing any legal authority, one industry commenter suggests that by simply alleging a violation of §253(a), the ordinance must be preempted unless it falls within the safe harbor of §253(c).[6] Another commenter at least acknowledges that the allegations must be proven before a finding can be made that §253(a) has been violated.[7] The Commission has clearly expressed the fact that the petitioner has the burden of proving by credible and probative evidence that the statute has been violated.[8] Problematically for Fiber Tech, there has been no credible and probative evidence provided which proves a prohibition of Fiber Tech's ability to provide telecommunications services. Thus, even if the Commission had jurisdiction under §253(d), there would be no need to engage in analysis under §253(c), as there has been no evidence presented proving a violation of §253(a).

AT&T incorrectly argues that this Commission has held that §253(a) forbids entry barriers "regardless of whether they are 'absolute' or 'conditional'", citing *Silver Star Telephone Co.*, 13 F.C.C.R. 16356, ¶8 (1998).[9] In fact, the Commission held in the *Silver Star* case that the

[5] Initial Comments of Local Governments, p. 6, n. 5
[6] Comments of AT&T, p. 4.
[7] Comments of Qwest Communications International, Inc., p. 1.
[8] See Footnote 2, *supra*.
[9] AT&T Comments, p. 2.

state regulation was preempted because regardless of whether the rural incumbent protection provision was deemed to be "'absolute', 'conditional', or something else, the fact remains that it is designed to prohibit the ability of entities to provide competing local exchange telecommunications services, which §253(a) forbids."[10] The specific facts of the *Silver Star* case led the Commission to conclude that the regulation in question was designed to prohibit the ability of certain entities to provide competing service. The question did not turn on whether the regulation was "absolute" or "conditional" and the decision certainly does not stand for the proposition that any "conditional" barrier is preempted.

AT&T argues that §253(a) is violated by regulations that simply "impede" competition,[11] and relies upon *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). TWT also argues that non-cost based fees are inappropriate because they reduce profit margins or force price increases that can reduce demand.[12] These commenters fail to acknowledge that the Supreme Court determined a mere increase in the cost of doing business does not amount to a violation of the Federal "impairment" standard. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 3889-390 (1999). In the majority opinion, Justice Scalia stated:

> [T]he Commission's assumption that any increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary' and causes the failure to provide that element to 'impair' the entrants ability to furnish its desired services is simply not in accord with the ordinary and fair meaning of those terms. An entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been 'impaired' in its ability to amass earnings, but has not ipso facto been 'impaired . . . in its ability to provide the services it seeks to offer;' and it cannot realistically be said that the network element enabling it to raise its profits to 100% is 'necessary'. [I]n a world of perfect competition, in which all carriers are providing their services at marginal costs,

[10] 13 F.C.C.R. 16356, ¶8 (1998).
[11] AT&T Comments, p. 2, n. 3.
[12] TWT Comments, p. 12.

> the Commission's total equating of increased cost (or decreased quality) with 'necessity' and 'impairment' might be reasonable; but it has not established the existence of such an ideal world.[13]

AT&T also cites *Pittencrieff Communications, Inc.,* 13 F.C.C.R. 1735, ¶32 (1997), aff'd *Cellular Telecommunications Indus. Assn' v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999), for the proposition that any requirement that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment" is to be preempted by §253(a).[14] In some respects, the issues in *Pittencrieff* are analogous to the present case. There, the challenge was to a state regulation that required CMRS companies to contribute to the state's universal service fund. The Commission found that the requirement to contribute under the Texas statute was applied to all companies, and the fact that CMRS companies had to pay more than prior to the time that the statute applied to them, did not effectively prohibit CMRS companies from offering telecommunications services. In this case, there has been no factual showing that the requirement for Fiber Tech to pay $8,900.00 to the Borough effectively prohibits it from providing telecommunications services.

Fiber Tech claims that if it has to pay $8,900.00 to use the state highway that runs through the Borough, or if it is not allowed to put its facilities in this location, it will be unable to provide services in metropolitan Pittsburgh.[15] On the other hand, the Borough has alleged that Fiber Tech can build out its system utilizing other property either outside of the Borough, or on parallel railroad rights of way.[16] Neither party has presented probative evidence to the Commission that makes either of these propositions more likely than the other. Fiber Tech is the entity seeking preemption, and as such has the burden of proof. In sum, Fiber Tech presented no

[13] 525 U.S. at 390 (footnote omitted).
[14] AT&T Comments, p.3.
[15] Fiber Tech Petition at p. 7, 11-12.
[16] Borough of Blawnox Comments, p. 9, 14.

evidence to prove impairment as described in *Iowa Utilities*, let alone an actual prohibition of the ability to provide telecommunications service.

III. INDUSTRY COMMENTERS MISUNDERSTAND THE APPLICATION OF THE ORDINANCE.

AT&T argues that the ordinance violates §253(c)'s competitive neutrality and non-discrimination requirements because it is imposed on CLECs and not upon the ILEC.[17] Both Fiber Tech and AT&T either misread or misunderstand the application of the ordinance.

The ordinance never even mentions the terms "incumbent" or "competitive local exchange carrier." It applies to all telecommunications providers, subject to certain exceptions. The exceptions that are relevant to this case state that the ordinance does not apply to services regulated by the Pennsylvania PUC for which a certificate of public convenience and necessity has been obtained and where a tariff has been filed.[18] If a CLEC provides the type of services that are covered by the exception to the ordinance, it is not required to pay the per linear foot charge. Indeed, Fiber Tech has claimed in its correspondence with the Borough that it meets this exception.[19] It may very well be that a Pennsylvania court would agree with Fiber Tech and determine that it falls under the exception to this ordinance. This is an additional reason why the Commission should defer any ruling on this matter to the courts of Pennsylvania.

In addition, while there may be some telecommunications services provided by the ILEC which fall under the exception, there may be additional services provided by the ILEC that do not fall within the exception. Therefore, regardless of whether a company is an ILEC or a CLEC, it may or may not be subject to the per linear foot charge, depending upon whether it falls within the exception to the ordinance. The facts of this case, and the specific provisions of the

[17] AT&T Comments, pp. 3-5.
[18] Borough of Blawnox Ordinance §1.1(P)(6)(2), attached as Exhibit B to the Fiber Tech Preemption Petition.
[19] Letter from Mario R. Rodriguez, attached as Exhibit C to Fiber Tech Petition. *See also*, documents attached as Exhibit E to Fiber Tech Petition.

Borough's ordinance, are not analogous to those of *TCG New York, et al. v. City of White Plains*, 305 F.3d 67 (2nd Cir. 2002), cert. denied, *City of White Plains v. TCG New York*, 2003 W.L. 162557 (U.S. Mar. 24, 2003), as this is not a case where the ordinance allows the Borough to "strengthen the competitive position of the incumbent service provider . . .."[20]

This is not a case of an ordinance that is applied differently to CLECs than to the ILEC. None of the industry commenters noted that the real distinction in the ordinance is that it purports to require payment of right of way fees to the Borough for facilities that carry some services of both ILECs and CLECs (those that are not subject to a Certificate of Public Convenience and Necessity from the Public Utilities Commission, or covered in a filed tariff), while excluding payment of rights of way fees for other state regulated services provided over the same infrastructure. As stated in the Local Governments' Initial Comments, the appropriateness of that distinction is best left to Pennsylvania courts.

IV. FAIR AND REASONABLE COMPENSATION IS NOT LIMITED TO COST RECOVERY.

Local governments reiterate their argument that the Commission has no jurisdiction to be considering whether this ordinance should be preempted on the basis of the compensation required.[21]

A. *The Commission Has Not Previously Opined On This Issue*.

A number of commenters have noted that while the Commission has not made a formal decision on a definition of fair and reasonable compensation, it has at least suggested that fees ought to be related to costs incurred by the local government.[22] However, in a letter to the Commission's Local and State Government Advisory Commission (LSGAC) dated October 18,

[20] *White Plains*, 305 F.3d at 79.
[21] Initial Comments, pp. 4-7.
[22] AT&T Comments, p. 7; Qwest Comments, p. 6.

2001, and regarding the intent of the Commission with respect to the specific language in footnote 7 of its Amicus Brief in *White Plains*, then General Counsel Jane Mago stated:

> Because the validity of gross revenues based fees was an issue discussed extensively in the main party briefs, we felt the need to acknowledge the issue and did so in footnote 7. As we have discussed, however, the footnote was not intended to represent a definitive FCC position that §253 precludes any compensation above cost recovery. Indeed, we recognized that this is an issue that continues to develop in the courts and before the Commission, and we deliberately limited our discussion of the issue in the Amicus Brief.

A copy of that letter is attached to these Reply Comments as Exhibit A.

B. *The Legislative History Of §253(c) Does Not Suggest Compensation Must Be Related To Costs*.

A number of the industry commenters suggest that the legislative history of §253 indicates that Congress intended the term "fair and reasonable compensation" to be limited to cost recovery only, and cite the recent case of *XO Missouri, Inc and Southwestern Bell Telephone Company v. City of Maryland Heights*, No. 4:99-CV-052 CEJ U.S. District Court, Eastern District of Missouri, February 5, 2003.[23] These comments, as well as the Court's analysis of the legislative history in *XO Missouri*, reflect a discussion of only the Senate side of the debate. The comments rely heavily on the fact that during the debate in the Senate, Senator Feinstein provided examples of local regulations that would be allowed under §253(c) including requirements to charge telecommunications companies fees in order to recover increased street repair and paving costs resulting from excavations.[24] The *XO Missouri* court cited the same discussion.[25]

[23] Qwest Comments, p. 5 ; Sprint Comments, p. 2 ; AT&T Comments, p. 7, 8.
[24] Qwest Comments, p. 5.
[25] *XO Missouri, supra,* at p. 10, 13 (full decision attached to AT&T Comments as Attachment A).

Neither the *XO Missouri* court nor the industry commenters made even passing reference to the legislative history of §253 in the House of Representatives. If the Commission considers the fair and reasonable compensation issue in this proceeding, it must not take so narrow a view and ignore the legislative history from the House, which clearly recognizes the property rights held by local government, and the ability to recover non-cost based compensation for its use by private entities.

H.R. 1555, the Communications Act of 1995, initially contained language in §243(e) which stated that local governments could not "impose or collect any franchise, license, permit, or right of way fee, or any assessment, rental, or any other charge or equivalent thereof as a condition for operating in the locality or for obtaining access to, occupying, or crossing public rights of way from any provider of telecommunications services that distinguishes between or among providers of telecommunications services, including the local exchange carrier." The Committee Report, filed July 24, 1995, describes the relevant portions of §243 as follows:

> Section 243(e) prohibits a local government from imposing a franchise fee or its equivalent for access to public rights of way in any manner that discriminates among providers of telecommunications services (including the LEC). The purpose of this provision is to create a level playing field for the development of competitive telecommunications networks. Harmonizing the assessment of fees from all providers is one means of creating this parity. It is not the intent of the Committee to deny local governments their authority to impose franchise fees, but rather simply to require such fees to be imposed in a non-discriminatory manner. This paragraph is not intended to affect local governments' franchise powers under Title VI of the Communications Act. Local governments can remedy any situation in which a fee structure violates this section by expanding the application of their fees to all providers of telecommunications services, including the LECs.[26]

[26] H.R. Rep. No. 104-204, at 75-76 (1995).

In the House debate on H.R. 1555, Representatives Joe Barton (R-TX) and Bart Stupak (D-MI) offered an amendment that included the language that essentially became §253(c). In an attempt to head off the adoption of the Barton-Stupak amendment, there was a Manager's Amendment to revise §243 to address some of local governments concerns, but which left in place the objectionable parity language of subsection (e). The Barton-Stupak Amendment proposed to strike all of §243 as reported by the House Committee and to substitute new language, which again, is essentially much of the language that currently appears in §253(a) through (c).

During the floor debate, Representative Stupak particularly stressed that the Barton-Stupak Amendment would delete the requirement for parity between the LEC and other providers, and instead could allow different compensation from different providers for the use of public rights of way. He stated:

> Local governments must be able to distinguish between different telecommunications providers . . . the Manager's Amendment states that local governments would have to charge the same fee to every company, regardless of how much or now little they use the rights of way or rip up our streets. Because the contracts have been in place for many years, some as long as 100 years, if our amendment is not adopted, if the Barton-Stupak Amendment is not adopted, you will have companies in many areas securing free access to public property. Taxpayers paid for this property, taxpayers pay to maintain this property, and it is simply not fair to ask the taxpayers to continue to subsidize telecommunications companies . . .[27]

Representative Barton stated a similar intent:

> [The Amendment] explicitly guarantees that cities and local governments have the right not only to control access within their city limits, but also to set the compensation level for the use of that right of way. . . . The Chairman's (Manager's) Amendment has tried to address this problem. It goes part of the way, but not the entire way. The Federal Government has no business telling State and local

[27] 141 Cong. Rec. H-8460 (1995).

> governments how to price access to their local right of way.[28]

Over the vigorous opposition of Representative Schaefer, the proponent of the parity language of §243(e), the House debated and adopted the Barton-Stupak Amendment by an overwhelming vote of 338 to 86. In arguing unsuccessfully against the Barton-Stupak Amendment, Representative Schafer and others made many of the same arguments that the telecommunications industry has made in prior petitions to the Commission, and in this proceeding. Representative Schaefer claimed that the acceptance of the Barton-Stupak Amendment "is going to allow the local governments to slow down and even de-rail the movement to real competition".[29] Representative Fields claimed that cities are allowed to charge the incumbent telephone company little or nothing because of

> a century-old charter . . . which may even predate the incorporation of the city itself . . . . [T]hey threaten to balkanize the development of our national telecommunications infrastructure . . . . When a percentage of revenue fee is imposed by a city on a telecommunications provider for use of the rights of way, that fee becomes a cost of doing business for that provider, and, if you will, the cost of a ticket to enter the market. That is anti-competitive . . . . [W]hat does control of rights of way have to do with assessing a fee of 11% of gross revenue? Absolutely nothing.[30]

If there is any further question as to whether non-cost based fees were intended, consider Representative Stupak's statement:

> . . . Mr. Chairman, we have heard a lot from the other side about gross revenues. You are right. The other side is trying to tell us what is best for our local units of government. Let local units of government decide this issue. Washington does not know everything. You have always said Washington should keep their nose out of it. You have been for local control. This is a local control amendment, supported by mayors, State legislatures,

[28] 141 Cong. Rec. H-8460 (1995).
[29] 141 Cong. Rec. H-8460 (1995).
[30] 141 Cong. Rec. H-8461 (1995).

> counties, Governors. Vote yes on the Stupak-Barton Amendment.[31]

After hearing these arguments, the House adopted the Barton-Stupak Amendment by a vote of 338 to 86. By this vote, the House strongly rejected the parity language, and adopted the same language as adopted by the Senate with respect to fair and reasonable compensation for right of way use. The arguments made for and against the Barton-Stupak Amendment in the House clearly reflect an understanding that the fair and reasonable compensation language permitted gross revenue based fees, and other kinds of compensation within the discretion of the local government, which was not limited to cost recovery. No other logical conclusion can be drawn from this legislative history.

C. *Judicial Decisions Are Split*.

Contrary to arguments made by the industry commenters, the case law interpreting §253 does not overwhelmingly support the conclusion that fair and reasonable compensation is limited to cost recovery. While a number of Court cases have interpreted fair and reasonable compensation in this way, the more compelling legal analysis is contained in those cases which recognize public rights of way as a valuable property right which cannot be taken by federal legislation and given to the telecommunications industry as a special privilege – case law which was omitted from the comments filed by the industry.

The industry comments focused heavily on the overriding goal of the Telecommunications Act to eliminate barriers to entry and to spur competition in the deployment and provision of telecommunications services throughout the nation.[32] This argument has been used as the basis to interpret the "fair and reasonable compensation" language of §253(c) as preempting the local government property owner from asserting its traditional authority to

[31] Id.
[32] AT&T Comments, p. 2; TWT Comments, p. 15; Qwest Comments, p. 5.

receive fair market value for its use by a private entity. When the federal government takes "the independently held and controlled property of a state or local subdivision, the federal government recognizes its obligation to pay compensation for it." *U.S. v. Carmack*, 329 U.S. 230, 242 (1946). The takings clause of the 5th Amendment requires just compensation to be paid to state and local governments as well as private property owners. *U.S. v. 50 Acres of Land*, 469 U.S. 24, 31 (1984). When a local government seeks "fair and reasonable compensation" for the use of public property, it is not acting in the capacity as a regulator. Rather, it acts as a property owner with an obligation to its citizens to obtain a fair return for the private use of a valuable public asset.

Over one hundred years ago the Supreme Court recognized that rights of way are property interests and that local governments have all of the normal rights of property owners in controlling that property.[33] This holding was ratified as recently as 1997 in *City of Dallas v. FCC*.[34] The requirement that telecommunications companies pay market driven fair and reasonable compensation for the use of valuable property rights is no less applicable for public rights of way than it is for a cable company hanging facilities on private property,[35] or for competitive providers placing switching equipment in a telephone central office.[36]

Contrary to Qwest's argument that "the majority of courts" have interpreted §253 to be limited to cost recovery,[37] the best that can be said is that the judicial decisions are split. The Commission is certainly aware of *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000),

[33] *City of St. Louis v. Western Union Tel.*, 148 U.S. 92 (1893), opinion on reh'g, 149 U.S. 465 (1893).
[34] *City of Dallas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997).
[35] *Loretto v. TelePrompter Manhattan*, 458 U.S. 420 (1982).
[36] *Bell Atlantic v. FCC*, 306 U.S. App. D.C. 333, 24 F.3d 1441 (1994).
[37] Qwest Comments, p. 7.

Omnipoint Communications, Inc. v. Port Authority of New York and New Jersey, 1999 WL 494120 (S.D.N.Y. 1999)[38]; *Qwest v. Portland*, 200 F.Supp.2d 1250, 1257 (D.Or. 2002);[39] *Bellsouth Telecommunications, Inc. v. City of Orangeburg*, 337 S.C. 35, 522 SE2d 804 (S.C. 1999)[40]; and *AT&T Communications of the Pacific Northwest, Inc., et al. v. City of Eugene*, 177 Ore. App. 379, 35 P.3d 1029 (Ore. App. Ct. 2001).[41]

V. THE COMMISSION MUST REJECT TWT's REQUEST TO UTILIZE THIS PROCEEDING AS A RULEMAKING PROCEEDING.

TWT urges the Commission to use this action of one company seeking preemption of the regulations of a small community, as a vehicle to adopt nation-wide rules that (i) limit the scope of local rights of way management authority, (ii) define the parameters of the safe harbor of §253(c); and (iii) define terms like "competitively neutral and non-discriminatory" and "fair and reasonable compensation". TWT's requests go far beyond the relief requested by Fiber Tech. For all of the reasons cited in the Local Governments' Initial Comments, which will not be repeated here, the granting of such request would undermine the ability of many interested parties to be heard, and would violate the Administrative Procedures Act.[42] The Commission must not take any action that would have the affect of converting this proceeding into a rulemaking.

[38] "…compensation has long been understood to allow local governments to charge rental fees [citation omitted].…It is thus doubtful that Congress, by use of the words 'fair and reasonable compensation' , limited local governments to recovering their reasonable costs." 1999 WL 494120 at *6

[39] Gross revenues based fees are permissible and not a barrier to entry. 200 F.Supp. at 1257; appeal filed May 8, 2002 (Docket No. 02-35473).

[40] City's right of way fee of 5% of gross revenues upheld.

[41] Rejecting claim that §253 limits localities to recovery of costs associated with use of the rights of way. 177 Ore. App. at 404, 35 P.3d at 1045.

[42] Local Governments' Initial Comments, pp. 11-13.

VI. THE COMMISSION SHOULD DISREGARD CERTAIN INDUSTRY COMMENTS RELATING TO OTHER LOCAL GOVERNMENTS, FOR FAILURE TO NOTIFY THOSE ENTITIES.

In 1999, the Commission recognized the problem of failing to notify the governments that were being brought before the Commission as examples of problems that warranted federal preemption of local authority.[43] Specifically, the Commission stated that

> We believe that service should be made not only on those states and localities that are the subject of the petition but also on those whose actions are identified as warranting preemption. We believe that this will enhance our ability to resolve such petitions in the public interest by giving the relevant state or local governments the opportunity to respond in a timely manner to the allegations made. We will therefore require that those filing such petitions must serve them on the state or local governments that are the subject of the petition as well as on those otherwise identified in the petition whose actions petitioners argue warrant preemption. Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under 47 C.F.R. §1.1212(d) and the parties are so informed.

While the Commission's decision references a requirement to provide notice to all local governments whose actions are identified in a petition, the basis for the notice, and the Commission's recognition that providing these local governments' due process and an opportunity to respond will "enhance our ability to resolve" the issues, suggests that notice and an opportunity to respond should be provided to any entity who has been identified in the proceeding, whether it is in the petition, or in any other document.

Specifically, TWT cites Phoenix and Tucson, Arizona, Atlanta, Georgia, Memphis, Tennessee, Albuquerque, New Mexico, Portland, Oregon and New York City as examples of entities that have imposed the kind of requirements that are contrary to §253 and ought to be

[43] *In the Matter of Amendment of 47 C.F.R. §1.1200, et seq. Concerning Ex Parte Presentations and Commission Proceedings*, FCC 99-322, GC Docket No. 95-21, ¶¶27-29, Released Nov. 9, 1999.

preempted. These local governments have not been notified, and the Commission should disregard TWT's arguments regarding these jurisdictions, unless and until they are notified of those comments and provided an opportunity to respond.[44]

Moreover, Qwest goes one step further by alleging that it has encountered multiple municipalities asserting "that the Telecommunications Act of 1996 creates 'new rights' regarding the public rights of way."[45] In essence, Qwest argues for preemption of the Borough's ordinance and adoption of a decision that would create new rules impacting every local government in the nation on the basis of its allegations that there are municipalities doing bad things – municipalities that Qwest will not specifically name, and taking actions that are not specifically described. These kinds of allegations cannot possibly be what the Commission had in mind when it directed that pleadings in §253 preemption matters should contain "credible and probative evidence."[46] Arguments made by industry commenters who fail to name the local governments they are accusing of improper actions, or who name the specific local governments but fail to notify them of the manner in which they are being presented to the Commission, should be disregarded.

CONCLUSION

The Commission simply does not have the jurisdiction to address preemption of rights of way ordinances that impose fair and reasonable compensation. The Commission should dismiss the matter without prejudice, and allow it to be heard in a Pennsylvania court.

If the Commission proceeds to consider this matter on its merits, there is nothing contained in the filed Comments that supports a finding of a violation of §253(a). This

[44] The failure to notify the named jurisdictions is exactly the reason why the Commission should not utilize this proceeding as a *de facto* rulemaking. Agency decisions that direct how all local governments do business should only occur after a public process where all interested parties receive reasonable notice and an opportunity to participate – especially those entities who are used by industry as examples of why traditional local authority should be preempted.

[45] Qwest Comments, p. 2.

[46] *See,* Footnote 1*, supra.,* 13 FCC Rcd. at 22971-72.

Commission requires a burden of proof to be met by credible and probative evidence, and the evidence is simply not there. Moreover, there is no evidence that the ordinance in question applies differently to ILECs than CLECs. With respect to all evidence offered, the Commission should disregard references to local governments that were not given notice that they were cited in these proceedings. All cited local governments should be given ample opportunity to respond.

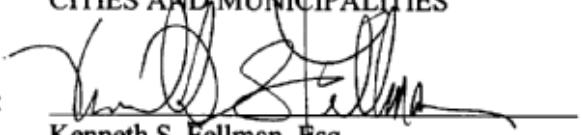
Should the Commission address the fair and reasonable compensation issue, despite the lack of jurisdiction, it must not disregard the legislative history from the House of Representatives. Clearly, both sides of the debate in the House recognized and acknowledged that the statute anticipated the imposition of non-cost based fees.

Finally, for the reasons previously stated, the Commission cannot, consistent with the Administrative Procedures Act, utilize this proceeding as a *de facto* rulemaking. If the Commission ever does choose to make specific determinations addressing the meaning of language in the Telecommunications Act of 1996 that has been subject to differing judicial interpretations, it must do so only in a separate proceeding, where all interested parties receive notice, and have an ample opportunity to participate.

The Local Governments respectfully request that the Commission dismiss this proceeding for lack of jurisdiction, defer action on the petition and refer it to Pennsylvania courts, or alternatively, deny the petition for lack of sufficient evidence.

Respectfully submitted this 29th day of April, 2003.

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS (NATOA), NATIONAL LEAGUE OF CITIES (NLC),UNITED STATES CONFERENCE OF MAYORS (USCM), NATIONAL ASSOCIATION OF COUNTIES (NACo), THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION (IMLA) AND THE PENNSYLVANIA LEAGUE OF CITIES AND MUNICIPALITIES

By: 

Kenneth S. Fellman, Esq.
Kissinger & Fellman, P.C.
Ptarmigan Place, Suite 900
3773 Cherry Creek N. Drive
Denver, Colorado 80209
Phone: 303-320-6100
Facsimile: 303-320-6613
kfellman@kandf.com

And:

Adrian E. Herbst, Esq.
The Baller Herbst Law Group, P.C.
953E Grain Exchange Building
400 South Fourth Street
Minneapolis, Minnesota 55415
Phone: 612-339-2026
Facsimile: 612-339-4789
aherbst@baller.com

Attorneys for the Pennsylvania League of Cities and Municipalities

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 2003, I served a copy of the foregoing on the persons listed below by depositing a copy of same in the U.S. Mail, first class postage prepaid addressed as follows:

Charles B. Stockdale, VP/Corporate Counsel
Robert T. Witthauer, Deputy Corp. Counsel
Fiber Technologies Networks, L.L.C.
140 Allens Creek Road
Rochester, New York 14618

Frederick A. Polner, Esq.
Rothman Gordon
Grant Building, 3rd Floor
300 Grant Street
Pittsburgh, Pennsylvania 15219-2203

John F. Cambest, Esq.
Blawnox Borough Solicitor
1001 Ardmore Blvd., Suite 100
Pittsburgh, Pennsylvania 15221-5233

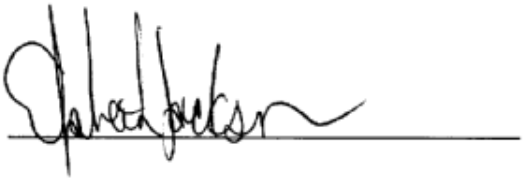
Mark C. Rosenblum, Esq.
Lawrence J. Lafaro, Esq.
Stephen C. Garavito, Esq.
AT&T Corp.
One AT&T Way
Room 3A250
Bedminster, NJ 07921

Matt Middlebrooks, Jr., Esq.
Sharon J. Devine, Esq.
Christopher J. Melcher, Esq.
Qwest
1020 – 19th Street NW, Suite 800
Washington, D.C. 20036

Richard Juhnke, Esq.
John Benedict, Esq.
Sprint Corporation
401 Ninth Street, NW, Suite 400
Washington, D.C. 20004

Craig T. Smith, Esq.
Sprint Corporation
6450 Sprint Parkway
Overland Park, Kansas 66251

Thomas Jones, Esq.
Wilkie, Farr & Gallagher
1875 K Street N.W.
Washington, D.C. 20006



Federal Communications Commission
Washington, D.C. 20554

October 18, 2001

NOV 26 2001

Kenneth S. Fellman, Esq.
Kissinger & Fellman, P.C.
3773 Cherry Creek N. Drive, Suite 900
Denver, Colorado 80209

Re: FCC *Amicus* Brief in *TCG New York, Inc., et al. v. City of White Plains*

Dear Ken:

Thank you for your letter expressing LSGAC's concerns about footnote 7 in the Commission's amicus brief in the *White Plains* case. The Commission was involved in the *City of White Plains* case as an amicus to express the agency's position that costs imposed on new entrants, but not incumbents are not "competitively neutral and nondiscriminatory" under Section 253(c) of the Communications Act, 47 U.S.C. §253(c). Because the validity of gross revenues based-fees was an issue discussed extensively in the main party briefs, we felt a need to acknowledge the issue and did so in footnote 7. As we have discussed, however, the footnote was not intended to represent a definitive FCC position that Section 253 precludes any compensation above cost recovery. Indeed, we recognized that this is an issue that continues to develop in the courts and before the Commission, and we deliberately limited our discussion of the issue in the amicus brief.

We share your concern that others are misrepresenting the language of the brief. It is regrettable that some people are misusing it in the way described in your letter. This is not the first time that has happened with a brief filed by the Commission. In our experience, we believe that the best approach to dealing with this problem is to allow the brief to remain filed with the court as written. The brief says what it says, and the Commission filed the brief with some care to avoid taking a firm position on revenue-based fees. If and when parties review the brief, they will see that is the case. Indeed, if the Commission were now to withdraw the brief or the portion including footnote 7, we believe that action could similarly be misconstrued. Therefore, we are not inclined to take any action with respect to your request.

Thanks again for keeping us informed of developments related to this issue, and please let us know if there are further developments.

Very truly yours,

Jane E. Mago
General Counsel

EXHIBIT
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